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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 606

NATIONAL SURETY CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 43–51) is reported at 143 F. (2d) 831.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1944 (R. 51), and a petition for rehearing (R. 52–56) was denied July 18, 1944 (R. 57). The petition for a writ of certiorari was filed October 17, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. A notice to detain an alien seaman on board ship because he did not possess a passport as required by Executive Order 8429 was served on the master of a foreign ship which docked at an American port. The principal question presented is whether the failure of the master to comply with the order constituted a violation of Section 20 of the Immigration Act of 1924.

Subordinate questions raised by the petition are:

2. Whether the circuit court of appeals held that petitioner, as surety, was not entitled to invoke any defense available to the principal.

3. Whether it was appropriate for the Boarding Officer of the United States Immigration Service to issue the order to detain on behalf of "the immigration officer in charge at the port of arrival."

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent statutes and Executive Order No. 8429 are set forth in the appendix, *infra,* pp. 18–21.

STATEMENT

On January 22, 1942, a complaint (R. 4–8) was filed by the United States in the United States District Court for the Southern District of Texas alleging that petitioner, as surety, delivered to the collector of customs for the Port of Houston, Texas, a bond as security for the payment of lia-

bilities incurred by one Georgios Pateras, Master of the SS *Marouka Pateras,* pursuant to the provisions of the Immigration Act of 1924 (*infra,* p. 19). It was further alleged that the condition of the bond had been broken in that the principal failed to pay to the collector of customs a fine of $1,000 imposed by the Secretary of Labor under the provisions of the Immigration Act of 1924, although the principal had been notified of the fine and demand had been made upon him (R. 8). In answer, petitioner alleged (R. 8–9) "that the bond was executed and delivered for the purpose of permitting the clearance and sailing of the SS *Marouka Pateras,* a Greek vessel, which up to that time had been denied clearance because of the alleged escape of a seaman as to whom the Immigration Authorities had purported to have issued a detention order; that the detention order served in respect of such escaped seamen was not valid or lawful and, in the alternative, even if valid or lawful the failure to obey or carry out the terms of such detention order did not and could not validly impose upon the master of the vessel, or his surety, liability for the penalty, said seaman not having been detained for any reason or cause set forth in the Statute authorizing the penalty."

The facts were stipulated (R. 10–12, 41–42) and may be summarized as follows:

The SS *Marouka Pateras* under command of the Master, Captain Georgios Pateras, arrived in

Bolivar Roads, Texas, on June 10, 1940. Included in its crew was one Salvador Pauruga, "a bona fide alien seaman" whose entry into the United States "was solely in connection with the business of the vessel or in pursuit of his calling as a bona fide seaman." The master of the vessel was ordered to detain Pauruga on board the ship by the Boarding Officer of the United States Immigration Service "by written order for the sole and only reason that he failed to have an identifying travel document in the nature of a passport as required by Executive Order No. 8429 of June 16 [5] 1940." Despite "guards and diligent customary efforts" to detain Pauruga, he escaped ship. Notice of Liability for Fine and a Bill and Notice of Fine were served on the Master on June 25, 1940, "for failure to detain such seaman as ordered to do, in violation of Section 20 (a) of the Act of May 26, 1924." On August 12, 1940, Pateras gave the bond in question in order that he might obtain clearance of his ship prior to the determination of whether a penalty would be imposed, and on November 5, 1940, a fine of $1,000 was administratively determined to be due and payable "solely upon the basis of the aforesaid Executive Order No. 8429."

On October 5, 1942, the district court entered findings of fact and conclusions of law (R. 15–21), and on January 4, 1943, judgment in the sum of one thousand dollars was entered in favor of the

United States (R. 28–29). On appeal to the Circuit Court of Appeals for the Fifth Circuit that judgment was affirmed (R. 51).

ARGUMENT

It is undisputed that the sole basis for the order to detain the alien seaman Pauruga on board ship was his failure to possess a passport as required by Executive Order 8429, promulgated June 5, 1940, pursuant to the authority vested in the President by the Act of May 22, 1918 (*infra,* p. 20), as extended by the Act of March 2, 1921 (*infra,* pp. 20–21); and it is likewise undisputed that that order was violated. Petitioner's principal contention (Pet. 3, 5, 6, 9–13) is that the order was void as having been predicated on an Executive Order which "was based on a nonexistent statute" (Pet. 5); in support of this contention petitioner argues that the statutes upon which the Executive Order is founded were repealed by the Immigration Act of 1924.

Section 20 of the Immigration Act of 1924 (*infra,* p. 19), requires specified persons, including the master of a ship arriving in the United States, to detain on board the ship (1) all alien seamen until the immigration officer in charge at the port of arrival has inspected such seamen, and (2) after such inspection to detain any such seaman on board or to deport him if required to do so by the immigration inspector or the Attor-

ney General. In the words of this Court, "The purpose of the section is to prevent aliens from unlawfully gaining entrance into the United States under the guise of seamen, and to this end it makes provision for detention on board, both temporary and continued, and for imposing fines on those who, when under a duty to detain, fail to do so." *Compagnie Generale* v. *Elting,* 298 U. S. 217, 222. As the court below held (R. 45–47, 49–50), Section 20 imposes an absolute duty upon a master who has been properly served with an order to detain an alien seaman, and if for any reason the seaman is not detained a fine of $1,000 may be administratively imposed. *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 61 F. (2d) 745 (C. C. A. 2), certiorari denied, 289 U. S. 730; *British Empire Steam Navigation Co.* v. *Elting,* 74 F. (2d) 204 (C. C. A. 2), certiorari denied, 295 U. S. 736; *Indemnity Insurance Co. of North America* v. *United States,* 74 F. (2d) 22 (C. C. A. 5). In this case (see *supra,* p. 4) it is not disputed that an official immigration inspector at the port of arrival boarded the ship, inspected the seamen, and issued to the master of the ship an order to detain the alien seaman Pauruga. He was not detained, and, in order that the ship might secure clearance prior to the determination of the master's liability for violating the detention order, petitioner, pursuant to Section 20, posted the bond which is the subject of the present litigation. Thereafter

administrative proceedings were had and a fine of $1,000 was imposed upon the master (see R. 13–15). In these circumstances, the notice to detain and its violation having been established, we submit that the fine was properly imposed. Petitioner contends (Pet. 3, 5–6, 8–9), however, that in the suit on the bond upon default of the principal it was entitled collaterally to attack the detention order and show that it was predicated upon an illegal Executive Order. The court below was of the view that Section 20 "does not contemplate inquiry into the grounds of the order" and that it does not at all limit the authority of the Immigration officer to require the detention of a seaman on board" (R. 49). The cases relied upon by petitioner were properly distinguished (R. 48, 49–50) on the ground that they hold only that "the giving and service of the order are essential, and that whether it was given and served may be inquired into;" they do not hold that the reasons for the order may be subjected to inquiry. However, assuming, *arguendo,* that the basis of the order may be collaterally reviewed, we think it clear, as did the court below (R. 50–51), that inquiry into the ground for the order shows that it was properly issued.

As we have shown the detention order was predicated on Pauruga's failure to possess a passport as required by Executive Order 8429 (*infra,* p. 21). That Executive Order was promulgated by

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the President pursuant to the authority vested in him by the Act of May 22, 1918, as extended by the Act of March 2, 1921. The 1918 statute empowered the President, "when the United States is at war," to regulate, *inter alia,* the entry of aliens into the United States (*infra,* p. 20). And the 1921 Act continued the provisions of the earlier statute "in so far as they relate to requiring passports and visas from aliens seeking to come into the United States * * * until otherwise provided by law" (*infra,* pp. 20–21). The nub of petitioner's argument is that with the enactment of the Immigration Act of 1924 the earlier statutes and the President's authority under them were superseded. This argument overlooks a vital distinction between immigrants and nonimmigrants which we think must be recognized in determining the scope of the Immigration Act of 1924. The Act defines the term "immigrant" (sec. 3, *infra,* p. 18) and requires that such persons shall have identifying travel documents (Secs. 2, 6–9, 8 U. S. C. 202, 206–209). Consequently, we agree with petitioner that as to such persons the 1918 and 1921 Acts no longer have any application.

We are not concerned here, however, with an immigrant. Rather, it is clear that the seaman Pauruga was not an "immigrant" within the meaning of the 1924 Act, for in the definition of "immigrant" Congress explicitly excluded "a bona fide alien seaman serving as such on a vessel

arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman" (Sec. 3). The Act contains no express requirements that nonimmigrants like Pauruga, who do not seek admission into the United States permanently or for any extended period but only seek permission to land while their ship docks at harbors in the United States, shall possess identifying travel documents. Furthermore, while the Act authorizes the promulgation of regulations for various specified purposes (see *infra,* pp. 18, 19), we think that there is serious doubt that the Act also authorizes the issuance of regulations of the nature of Executive Order 8429. The regulations authorized to be issued by Section 15 (*infra,* p. 18) relate to non-immigrants who seek to remain in the United States for fixed periods of time or during the continuation of a status which entitled them to admission and it requires that the regulations promulgated shall be "to insure that at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States." Section 19 (*infra,* pp. 18–19), which permits an alien seaman to land "pursuant to such regulations as the [Attorney General] may prescribe for the ultimate departure, removal or deportation of such alien from the United States," is in all material respects the same as its predeces-

sor, Section 32 of the Immigration Act of 1917,[1] and we think it authorizes regulations providing for the removal and deportation of an alien seaman from the United States. It is to be noted that in construing Section 32 of the 1917 Act it was held that the section did not authorize a regulation requiring an alien seaman to post a bond as a condition to landing temporarily in the United States. *United States* v. *Stump,* 292 Fed. 354 (C. C. A. 4). Even more important is the fact that despite the existence of the regulatory power granted by Section 32 of the 1917 Act the President believed it necessary to promulgate Executive Order 8429 under the authority conferred upon him by the 1918 and 1921 Acts, so that the entry of alien seamen into the United States could be controlled by requiring travel documents of them. Finally, Section 24 (*infra,* p. 19) authorizes the issuance of regulations for the enforcement of "the provisions of this Act." But since, as we have shown, the Act does not pur-

[1] Section 32 of the Immigration Act of 1917 (39 Stat. 895) provided:

"No alien excluded from admission into the United States by any law, convention, or treaty of the United States regulating the immigration of aliens, and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States, * * *"

port to require alien seamen to possess travel documents as a condition of temporarily entering into the United States, regulations requiring such documents could not appropriately be predicated on Section 24.

Our view of the scope of the 1924 Act is supported by the administrative construction of the Act. Regulations requiring travel documents have not been predicated upon the 1924 Act; instead, Executive Order 8429, which was promulgated long after the 1924 Act became law, specifically states that it rests on the authority conferred upon the President by the 1918 and 1921 Acts. While extensive regulations have been promulgated by the Attorney General relating to the entry of alien seamen into the United States, they rely upon Executive Order 8429 for the requirement that alien seamen shall possess specified travel documents. Thus Regulation 120.21 provides that an alien seaman, under specified conditions, may be temporarily admitted if "he is in possession of a passport, or some other document in lieu thereof, which is acceptable under the applicable Executive Order and regulations prescribing the documents required of alien seamen and which satisfactorily establishes his identity and nationality."[2]

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[2] Regulation 120.21 (8 C. F. R. Cum. Supp. 2704–2705) provides in part:

"(a) Any alien who upon arrival establishes that he is a bona fide seaman as defined in section 120.2, is admissible as a

In these circumstances, we submit that as to alien seaman the 1918 and 1921 Acts are entitled to be given full force and effect and that Executive Order 8429 is properly predicated upon those statutes. *United States* v. *Phelps,* 22 F. (2d) 288 (C. C. A. 2); *United States ex rel. Komlos* v. *Trudell,* 35 F. (2d) 281 (C. C. A. 2), certiorari denied, 280 U. S. 607; *United States* v. *Karnuth,* 30 F. (2d) 242 (C. C. A. 2); *Bennedsen* v. *Nelson,* 2 F. (2d) 296, 298 (D. Minn.). Neither *Johnson* v. *Keating,* 17 F. (2d) 50 (C. C. A. 1), nor the opinion of Attorney General Jackson, 39 Op. A. G., 509, 515–516, relied upon by petitioner, are inconsistent with this view. The *Johnson* case was concerned with travel document requirements applicable to an *immigrant* and the court was careful to limit its holding to that situation: "We

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nonimmigrant under section 3 (5) of the Immigration Act of 1924 and is not inadmissible under the other provisions of this part and of Part 175, may be temporarily admitted for such period of time as the examining immigrant inspector shall designate, not to exceed, however, the time the vessel on which the alien arrives remains in the United States and in no event to exceed 30 days, if

"(1) His name appears on the duly visaed crew list of the vessel on which he arrives, unless such vessel is excepted from the requirement of submitting a visaed crew list under the applicable Executive order and regulations prescribing the requirements for crew list visas; and

"(2) He is in possession of a passport, or some other document in lieu thereof, which is acceptable under the applicable Executive order and regulations prescribing the documents required of alien seamen and which satisfactorily establishes his identity and nationality. * * *"

think that the act of 1924 * * * now contain[s] (*so far as our present problem is concerned*) provisions of law excluding any power otherwise vested in the President under the act of 1921, and that Congress had 'otherwise provided by law,' when the [President's] proclamation was issued." (17 F. (2d) at 53. Italics supplied.) Likewise, the opinion of the Attorney General, relying on the *Johnson* decision, concluded only that the "1921 act is no longer applicable with respect to immigrants."

In respect of petitioner's argument that Section 20 does not contemplate a detention order based on Executive Order 8429 it should be noted that all of the immigration laws and regulations constitute a uniform plan and that they must be read as a whole in determining the scope of each provision. *Lloyd Royal Belge Societe Anonyme* v. *Elting, supra.* To insure this result Section 25 of the Immigration Act of 1924 provides:

> The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien,

> although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Viewed in this light, we think it clear that Section 20 contemplates the enforcement of every detention order, regardless of whether it is issued because of a failure to comply with the terms of the Immigration Act of 1924 or with the terms of other immigration laws or regulations *in pari materia* with that Act and not inconsistent with it. As the court below held (R. 50–51), Executive Order 8429 is perfectly consistent with the 1924 Act and the regulations issued thereunder; petitioner makes no showing to the contrary. Thus, we submit, violation of a detention order, such as that here involved, which is predicated on a failure to comply with the Executive Order supports the imposition of the penalty prescribed by Section 20 to the same extent as it would if the order were predicated on the 1924 Act or the regulations issued thereunder. In this respect it is to be noted that the penalty imposed upon the master was for violation of Section 20 of the Immigration Act of 1924, not for violation of Executive Order 8429. Consequently, it is plain that petitioner's argument (Pet. 5) that the Executive Order may be enforced only through the sanctions provided in the law upon which it is based is beside the point.

2. Petitioner also urges (Pet. 2, 5–6, 8–9) that the decision of the court below is in conflict with decisions of other circuit courts of appeals which are construed by petitioner as holding that defenses available to the principal in an action such as this one are likewise available to the surety. A short answer to this contention is that while the court below did advert to the general rule that the surety may plead any defense available to the principal and the exception to the rule that the surety "is not excused where the principal when sued takes advantage of a matter of defense which is altogether of a personal character or where the extinction of the principal's obligation arises from a cause which originates in the law" (R. 49), it did not predicate its decision on any such rule. Rather, it concluded that no one, not even the principal, was entitled to make the defense which petitioner asserted and that even if it were assumed that the defense could be made, it was without merit. We submit, there is no occasion for inquiring into the question whether, if a defense to a suit on the bond were open to the principal, petitioner, as surety, would be entitled to make it.

3. Section 20 of the Immigration Act of 1924 requires the master to detain on board ship every alien seaman until he has been inspected by the immigration officer in charge at the port of arrival and it provides that the master shall detain

a seaman on board after such inspection if required "by such inspection officer." Relying on a dictum in *Rio Cape Line Limited* v. *United States*, 89 Ct. Cls. 307, 316–317, that the statute must be literally complied with, petitioner contends (Pet. 3, 5, 6, 13) that the order to detain Pauruga was invalid because it was issued by a boarding inspector acting on behalf of the immigration officer in charge rather than by the latter personally. This contention we submit is predicated upon a wholly unrealistic approach to the functions of the immigration officer in charge of a port. The Act imposes many and varied duties upon him and it is obviously impossible for him personally to perform all of them. Thus, for example, if several ships docked at the same port on the same day he could not personally perform the duties imposed upon him by Section 20 alone even assuming that he disregarded his other duties. In accord with the generally accepted view that executive officers may delegate their functions to subordinate officials responsible to them, we think it clear, and the cases so hold, that a detention order issued by a boarding inspector on behalf of the immigration officer in charge, as in this case, sufficiently complies with Section 20. *Indemnity Insurance Co. of North America* v. *United States, supra; Lloyd Royale Belge Societe Anonyme* v. *Elting, supra; The City of Harvard*, 52 F. (2d) 461, 462 (S. D. N. Y.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1944.